

**SPECIAL MEETING
BOARD OF MAYOR AND ALDERMEN
(PUBLIC HEARING/POLE LICENSE AGREEMENTS)**

March 30, 2005

6:00 PM

Mayor Baines called the meeting to order.

Mayor Baines called for the Pledge of Allegiance. This function being led by Alderman Porter.

A moment of silent prayer was observed.

The Clerk called the roll. There were ten Aldermen present.

Present: Aldermen Roy (arrived late), Guinta, Sysyn, Porter, O’Neil, Lopez, Shea, Garrity, Smith and Forest

Absent: Alderman Gatsas, Osborne, DeVries and Thibault

Mayor Baines advised that the purpose of the special meeting is to hear those wishing to speak in favor of or in opposition to the City’s Board of Assessor’s request that all existing pole license agreements be amended; that the Clerk will present the proposed changes for discussion at which time those wishing to speak in favor will be heard, followed by those wishing to speak in opposition; that anyone wishing to speak must first step to the nearest microphone when recognized and recite his/her name and address in a clear, loud voice for the record, that each person will be given only one opportunity to speak; and any questions must be directed to the Chair.

The Clerk presented the proposed changes:

“In accordance with the requirements of RSA 72:23, I(b), the licensee(s) and any other entity now or hereafter using or occupying municipal property pursuant to this license shall be responsible for the payment of, and shall pay, all properly assessed personal and real property taxes no later than the due date. Failure to pay duly assessed personal and real property taxes when due shall be cause to provide a written notice to said licensee to show cause by a date certain specified in the notice as to why this license should not be terminated for nonpayment of the sums due.

The changes to the within license set forth in the preceding paragraph shall take effect April 1, 2005, and shall remain in effect until changed in accordance with the requirements of RSA 231:163.”

Mayor Baines requested that Steve Tellier, Chairman of the Board of Assessors, make a presentation.

Mr. Tellier stated what we have is a very brief power point presentation. Our handout is before you and I'll ask Assessor Steve Hamilton to proceed.

Mr. Hamilton stated the issue of the taxability of the land under which pole licenses occupy has been one that has been traveling through the courts since 1999. The City of Rochester began taxing/assessing a real property tax against those licenses. Part of the procedure that they had followed was requirement RSA 72:23 I(b) to have those people who lease property of the City pay property taxes. The Pole License Agreements have been existing in the City and in the State for a number of years. According to research done by the New Hampshire Municipal Association it began as a process where the cities developed the license for these utilities to utilize the poles and evolved into a procedure that the utilities themselves came for the pole licenses of their own wording. The license that's granted for each pole, conduit identifies a portion of the right-of-way that's owned by the City and that property has been identified by the Supreme Court as property of the City whether it's owned or just part of the street. The license grants an exclusive use of a portion of the City's property. Most of the pole license agreements in the City are granted to Public Service Company of NH and Verizon of New England. These are the two most affected licensees...haven't been able to identify others...specifically, there may be others that exist. The value that is to be assessed is on the portion of the right-of-way that's occupied by the license itself and it's not a tax on the physical pole as those properties have been made exempt by the Legislature. The Legislature provided in RSA 72:23 I(b) leases or other agreements that dedicate property of the City to a private organization subject to property taxes and that requirement was clarified, strengthened by two Supreme Court rulings...they're commonly known as Rochester I and Rochester II that stated that these particular license agreements were in fact leases of city property. I can just read to you briefly from what was Rochester II that was an opinion issued July of 2004 that the courts said "we hold that the language of RSA 72:23 I(b) is unambiguous. According to the plain language of the statute leases and other agreements which permit the use and occupation of public property must arrive through properly assessed real estate taxes. The statute does not include an exemption for private companies that use or occupy public property by a public service, therefore, we conclude that irrespective of the type of service to be provided legislature intended for leases and other agreements that permit the use or occupation of public property to include a provision requiring payment of properly assessed real estate taxes." That language is pretty much the reason that we're here tonight because the Assessor's believe that the City and having spoken to the City Solicitor he agrees as well that new license agreements would have to include language on taxation of the property. What we're asking is an amendment to the existing license agreements so that they would be of the similar language to the new licenses that will be issued in the future. The Supreme Court in these decisions also indicated that the City can amend the existing license agreement without the consent of the license holders as that is a legitimate public purpose in order to comply with the existing statutes 72:23 I(b). The change in the language of the license agreement is going to enable us to ascribe a value to this property. I can't sit here right now and tell you well I think that value should

be...we're not certain, but the general tax burden of the City will be reduced by the amount of the assessed value placed on this property that the City has leased to the licensees. We don't have an accurate count of how many poles or conduits are covered by these license agreements...reasonable estimates that we have been able to develop are between 17,000 and 20,000 licenses. Our first task will be to determine how many licenses actually exist and where the locations of the poles are. We're hoping to use the GIS System to help us in that as well as cooperation of other departments. In terms of the value of the property our first impression is not going to be a huge windfall but rather a relatively modest sum. The license holders are going to have every right to due process that any taxpayer has in the City including the right to file for an abatement of their taxes, the right to appeal those abatement decisions so this isn't something that's outside of the normal property tax structure. The Assessor's are going to work with the affected license holders in order to help us to understand what the value might be, there could be a scribe to those licenses help them have some input in the process. It is clear that there may be some new burden of taxation placed on the license holders that's a reality.

Mayor Baines asked is there anything else?

Mr. Tellier replied that's it, Mayor. We certainly are open to answer any questions you or the Board may have.

Alderman Porter stated I think what we're doing is basically looking at giving the City the right to tax it...well, should it be taxable...I guess there has been some decision made that they can be taxed. But, I find it unusual to have a presentation and the public and a vote on the same evening because I don't think people have had a chance yet to take a look...how many people have had an opportunity to be for or against it. I think this should have been done much earlier or we should hold off and take a vote. I understand the April 1st date is coming up but where was this...this just didn't come upon the scene...this has been around for a long time and I think that this should have been brought before the Board several months ago.

Mr. Tellier stated we learned of the decision...the decision is only sixty (60) days old...the second one.

Alderman Lopez stated while they're looking for that can we have the City Solicitor guide us legally.

City Solicitor Clark asked what's your question?

Alderman Lopez replied whether it's legally in reference to this.

City Solicitor Clark stated the court has ruled that license holders are the equivalent of leaseholders and that property can be taxable. To do so you have to amend the license, the existing licenses to include this language. The statute that allows to amend it requires you to hold a hearing. Future licenses I do believe have to comply with the statutes to require that this language be in it.

Alderman Forest stated to answer Alderman Porter's question I believe we had brought this up before the Board before. I believe we took a vote on this and I think that is why we're having a public hearing tonight.

Mayor Baines stated that was a separate issue that was on poles.

Alderman Porter stated this has nothing to do with the telephone poles.

Mr. Hamilton stated while the decision did come out in July of 2004 most of the assessing community and much of the municipal government community has been struggling with what it actually meant, how it would affect us. There has been a working group of municipal officials including officials from Manchester that's been trying to get to an understanding of how these licenses operate and there are two issues that are involved. One of them is placement of municipal assets on the poles, which are located in the license location. Second is an issue of taxation...that group has been working since the fall of 2004 in trying to come together with a comprehensive recommendation; that recommendation came out on March 1, 2005 so there hasn't been a lot of time for us to prepare to bring this kind of a petition which we did on March 8th.

Alderman Porter stated let me just clarify I'm not trying to take shots. I simple think that on March 30th to make a decision to tax something April 1st...number one does not give the users an opportunity or the public "for or against" because I think we're back to the same situation as we were with the poles in terms of the taxation. If there is an addition to the expenses of Verizon, for example, who would be the primary user...I remember years ago kind of looking at these and Verizon has approximately, as I recall, around 75% of the poles are used by Verizon...they don't use every pole that PSNH does. But, I think they're about 75% and I'm just thinking that you might want to pursue that to adjust the numbers and I can understand the rationale for saying that if we go ahead and tax them we want to make sure we can. The other question I have is have you established and adopted any methodology because the Rochester case was ruled legal by the Supreme Court but their methodology was thrown out because they used a diameter on an 18" pole, they used I think a 25 foot diameter. Has this been addressed, the methodology that you're going to use to arrive at a value?

Mr. Tellier replied you raise a very appropriate question, Alderman. The fact is we're seriously deliberating the methodology and that methodology that you question that was remanded back to the Superior Court for further deliberations and some sort of consensus.

So, to answer your question factually there is no generally-accepted approved methodology; that was one of the notations we placed in this that we would wish to collaborate with Verizon and Public Service in working with them on an accepted methodology providing for depreciation, cost and those types of issues that relate to that.

Alderman Porter stated I can understand that and these are all things that will be worked out. I think a number of the communities...when you say they haven't paid a dime then are they under the danger of having the Tax Collector acquire their taxes through a tax deed. Were these billed on a regular bill or were they done on a supplemental warrant where it didn't impact on the tax base, have these...

Mr. Tellier interjected I can answer these questions. Rochester was a supplemental bill the first year which did not affect their overlay...subsequent years they appropriated monies for a potential abatement. Hudson and Conway have appropriated monies in the event that there is an abatement, they have escrowed monies for that. The first year was supplementally billed where it didn't affect the budget...ensuing years there was a small portion of monies set aside in event an abatement was required.

Alderman Porter stated without a methodology or without having some way of knowing that what you're going to do is able to be sustained in the event of an appeal I just would like to throw out that we should have a little bit of caution to approve the ability to tax something when you really don't have a concrete methodology or formula as to how you're going to tax them nor do you really have an accurate count. So, we can't determine the amount of money that will be generated. The other thing is any additional expenses will be handed and passed on to the taxpayer and we'd just like to make sure that what is then doesn't generate more money through a surcharge than it would through the taxes.

Mr. Hamilton stated the Assessor's take all of those points to heart and we're trying to be very cautious in this. We have been cautious when the originally ruling came out a number of years ago and under the original Rochester I decision it could have been inferred and it was inferred by a number of communities that this property was taxable and they went ahead and made the property taxable and tried to collect taxes on. Now, we're not telling you that we have a methodology that's a good methodology...one of the things that we were holding off and hoping would come out would be resolution from the tail end of that case which would be the methodology still pending in Superior Court on the Rochester case, however, at this point this is an avalanche that's falling. While the City has not wanted to be on the very leading edge of that avalanche we don't want to be on the tail end of it either. So, we're trying to be cautious. We're not asking you to amend the licenses in a manner which would result in automatic revocation of the license which would be one way to go...we're asking that if the property taxes are not paid the Board of Mayor and Aldermen could have the license holder tell them why they didn't pay the taxes...so, we're offering every opportunity to these license holders to be heard in the process.

Mayor Baines stated I have a question that's goes to the pass through issue that it'll end up being a pass through issue...we tax them on one side and they're going to put that cost onto the users and they're going to pay it anyway in one way or another and if that is the case why would we go through this process.

Mr. Hamilton stated I guess there are two ways to answer that. One is that Verizon when they hold the license on the pole they not only use it for their own purposes they also rent it for other purposes and they have tenants on those poles that they collect rent from. In some municipalities Verizon is seeking and other utilities are seeking to get payments from the municipalities that granted them licenses in order to locate their property back on the pole. So, they get a fee...any equipment that's located on the pole located in the license areas. So, a part of it may be passed back through or it may go off to their tenants...whether it's Comcast or some other cable company or telephone or alarm company that may be using the poles as well. So, it may come back to the taxpayer, it may not come back.

Mayor Baines stated I'll give you an example, not to debate it obviously. I have the same concerns as Alderman Porter has...so, let's say it's passed onto Comcast and then Comcast passes it through...

Mr. Hamilton stated I agree. On that level it may well come back to the average taxpayers, however, on the flip side the alternative argument is that if we tax a grocery store won't they simply pass that tax through to the people who buy groceries in that store. So, for any commercial enterprise that sells a service or a product to the public they have a tendency to pass their tax burden through the customers as well.

Alderman Guinta stated I want to clarify something as I understand it. Alderman Porter I assume when talking about methodology you're talking about valuation methodology of the property in question. I'm following your logic but if we tax a grocery store theoretically they're going to pass through that tax to the consumer. So, I guess I'd ask these similar questions in a different way. Aren't Verizon and Public Service already paying taxes on the lines or the cables...they're paying telecommunications taxes for Comcast, for example, they're paying for taxes on everything but the right-of-way I would assume.

Mr. Tellier stated Public Service is paying taxes on their poles, wires, transmission lines and the right-of-way...generally recognizing that that value is in the unit value, in the entire value that's assessed by the State and then a portion to all the communities. Currently, Verizon's pole, wires and conduits are exempt by State Statute...

Alderman Guinta interjected because they have a telecommunications tax.

Mr. Tellier stated that is correct. This is a separate issue.

Alderman Guinta stated this is a separate issue but when the Legislature took up the telecommunications tax...maybe you'd recall better than I would, Alderman Porter, 15 years ago. The whole discussion at the Legislature at that time was which one are we going to use, which one are we going to tax...we're not going to tax both. So, now today we're looking to say well even though we had the debate in '90 and we opted for a telecommunications tax now we're going to include a new tax is the way I'm viewing this and I agree there's clearly going to be a pass through. I've talked to both PSNH and Verizon and they've said it to me...there's going to be a pass through.

Mr. Tellier stated honestly I can't agree or disagree but it is likely that there would be some measure of pass through but the fact remains that these discussions have been held at length in the Supreme Court deliberations and what we're asking of the Board here is to facilitate a mechanical means to allow us to do our job as has been outlined by the Supreme Court while we've also been on the record is to assure this Board that we're not out to gouge them, that we're going to open our doors and invite them to sit at the table to look at something that is fair and reasonable and deliberate that with the communications entities as we have yearly with the electric utility or gas.

Alderman Guinta stated I don't see any undue...I don't see there being any...I appreciate why you're doing it and I think you're trying to be fair and just in the process. I would also say that the Supreme Court decision doesn't require us to do it, to make this change. It only enables us to do it but it's up to us and we don't have to do it today. We can do it a year from now. We're looking at it today in case we want to have some sort of tax impact on the FY06 budget I would assume. So that we're all clear we could wait a year.

Alderman Lopez stated that's where I'm confused. I just want to be clear on what the Alderman said from the City Solicitor. Are we obligated and legally obligated to comply with the State Statute or can we just say no or yes?

City Solicitor Clark replied the court hasn't been 100% clear on that. The statutes now require the municipalities to issue tax bills to everybody that's on taxable property, that's a general statement, however, they've also ruled that the licenses that don't have the language in it are not taxable. There are several municipalities and towns and cities in New Hampshire that have not done this yet. I think the majority have not, I believe some have. There's no timeframe I don't think that mandates you do it this year. The Assessor's came to talk to me about this and my advice to them was that they're under an obligation to bring it to this Board. They have to advise you of the potential taxability of this land. They may come back and say that there is no value so there are no taxes. But, that's their deliberations on their own...they're under an obligation to bring it to this Board. Now, this Board does have some discretion as to whether or not they want to go forward and amend these at this

point. I think eventually everybody in the State will be on the same page but it's probably not going to be this year.

Mayor Baines stated I appreciate that question but I am going to go back to the supermarket analogy...we don't have any discretion to tax the supermarket. We have to assess them whatever their value is which gets to the heart of the question if in fact the courts say that is taxable property do we even have a legal right not to tax them? Could you clarify that in my mind because I had not gone to that range of thinking before.

City Solicitor Clark replied the court have ruled for many years now that when the City gives somebody a lease on property and they generate income off that lease that that lease has to be taxable. In the past, licenses for poles were not really considered leases, they were considered licenses because you could tell them to get off and they had no property rights. In the last Rochester case the Supreme Court has ruled that now these licenses are the equivalent of a lease, however, you can't tax them unless you have this language from the statute in the license and the only way to put the language into the license is to have a hearing and to vote it in because these licenses have been in effect and you can't change them. Now, eventually I believe unless the court changes its mind...that does happen at times...eventually, every municipality I think is going to have to amend their licenses to include this language. We're not under a court mandate to do it right now.

Alderman Lopez stated like you said do they not have the fiduciary responsibility with the State law and we're stopping them if we say no.

City Solicitor Clark replied in a strictly black and whit society that might be true. However, this particular issue has been winding through the courts for so many years and it is still winding through the Legislature...I believe that the legislation will change in this eventually one way or the other. I don't see where there is a judicial or legislative mandate that this Board has to take action today. I believe the Assessor's did what they had to do to bring it forward. I believe you probably have enough discretion that if you said no today that no one is going to jump down your thought saying you're violating the law.

Alderman O'Neil asked is Public Service affected by this or just Verizon with Comcast as a tenant or a renter of Verizon?

Mr. Hamilton replied that we and PSNH believe that they have licenses that are affected. The question becomes an interesting one because the way that the State values PSNH's property is what's called a unit method. They ascribe a value to all of the property that PSNH utilizes generating towards the delivering including the poles, wires, conduits and perhaps in theory is there is a value to this license then they may already be paying taxes on the value of that license location.

Alderman O'Neil stated okay so they may be. Then the other thing in just regarding your analogy using grocery stores...the only difference is the consumer in Manchester has an option of which grocery store to shop at...there aren't a lot of options when it comes to the utilities...your gas company is KeySpan, your electric company is Public Service, your phone company although there are some alternatives there...I'll just go onto some general statements I don't have any more questions. PSNH, Verizon and Comcast are three companies that have made significant investments in this City both as being largest property taxpayers in this City and through largest employers. No doubt about it this will be a pass through and the consumers are going to pay for this. It's not newfound money for us. Our citizens will pay for this including our most vulnerable. We don't need to get involved in legal action and appeals and all that with all due respect to Attorney Clark who has enough to do...he has enough appeals to fight. This to me just sends the wrong message of the wrong kind. The companies could locate any of their operations in other communities but all have made a commitment to Manchester and they are to be commended for that, so I will either make the motion to deny this or if there is a motion to approve this I will vote against it.

Alderman O'Neil moved to deny the petition to amend all pole license agreements.

Alderman Smith duly seconded the motion.

Alderman O'Neil stated I said this to all three of the Assessors. This in no way reflects my confidence in them it's just a personal, philosophical thing for me. So, I just want to make that clear.

Mayor Baines stated by the way I'm not going to accept that motion because we haven't covered everything yet we will wait for any action for now.

Alderman Smith stated I own property on the Seacoast and in Fremont and I know the situation in Rochester and I know involves Until this is where I get my electricity from in Hampton. I firmly believe that this is the way to get revenue...you're taxing the land but you can't give us an answer how much it's worth, you don't have any idea of the value of property and I have to agree with Alderman Porter, Alderman O'Neil...I think the timeframe is too quick for us. I think that we should be able to wait and get further results from the courts. Like I say it's like a double tax. There's no question in my mind that this will be passed on to consumers. We saw that with Comcast when they first came in with the franchise rates going up and I think that we should table this or whatever.

Alderman Guinta stated I have just two quick points. Is there a penalty, Tom that can be levied against the City if we do not institute this change?

City Solicitor Clark replied if you don't do it now, no.

Alderman Guinta stated the second point I have is why don't we look at this from a different perspective. If most of the communities in the state are in the process changing it or plan on changing it let's me the only one that doesn't enter into an agreement with the affected companies to say hey, look in the other parts of the state that you're going to have to raise rates because of the pass through let's secure some sort of documentation that says they're not going to do that in Manchester. At least we can partner up with the companies...hey, look we disagree with this policy and get some sort of verification from either PSNH or Verizon that there will be no rate increase in Manchester as a result of keeping the current agreement in place.

Mayor Baines stated I'm going to ask mister...I don't think that's possible.

City Solicitor Clark stated I don't believe that would be allowed by the Public Utilities Commission (PUC).

Alderman Guinta stated I don't know that that's necessarily true.

City Solicitor Clark stated generally rates are established by PUC after evidence given by the companies and by the public advocate. It is my understanding that they do not allow different rates to be applied to different communities.

Alderman Guinta stated no but I they allow rebates, then get a rebate...the City of Manchester.

City Solicitor Clark stated at that point you're going to be talking more than just the issue of rates because if all of the other communities are doing it then Manchester will be the only community probably not following the law at that point because the Supreme Court would have been involved...

Mayor Baines stated that was my other point. Eventually, it's going to be settled one way or the other. It's not going to be this way for Manchester and this way for the rest of the state.

Alderman Guinta stated my point is we could make a statement as a community that if there is no ability...because we are going to end up having a pass through even if we don't do this. Let's act now as the largest community in the state and say wait a minute this is the wrong policy for the state because it's a pass through to everyone in the state.

Alderman Porter stated one comment...I think it ties in with what Alderman O'Neil said...and there are a couple of things. First of all, as the Assessor's have said there have been no communities that have received any money yet so it shows you that it's kind of influx. The other thing is being the largest city in the state we wear two hats. We wear the hat of major responsibility and the tax base is one of the largest in the state...Nashua's

probably been pretty close but I think it's well documented that industrially, commercially and so forth and I think that the smaller communities...mostly, all they have for utilities are the wires and the rights-of-way and the conduits, etc. In Manchester you've got Verizon, Comcast, KeySpan...they own a substantial amount of property, they're extremely large employers in the City so I think that that sometimes makes us have to think of the overall ramifications and I guess I'd just like to see what occurs in the next several months with this tax rather than go forward this evening.

Mr. Tellier stated that Messrs. Nichols and Hamilton have asked me to convey is that we appreciate the comments and the confidence in our Board of Assessors and the action. We clearly found it our duty to bring it and that we're satisfied with the direction that the Board of Mayor and Aldermen will ask of us.

Alderman Roy stated in one of your slides you used 17,000 to 20,000 poles.

Mr. Tellier stated that does not include the amount of linear conduits for linear feet of wire that's about 17,000 to 20,000 poles in the City.

Alderman Roy asked of City Solicitor. If the rest of the state through legal action moves this direction and PUC approves the rates will the pass through hit Manchester residents no matter what?

City Solicitor Clark replied yes. But, I just want to point out that as the Assessor's have advised this Board there is serious negotiations going on with utilities now through the Municipal Association and officials from various municipalities. Several officials from Manchester are involved in those negotiations and this is going to wind its way through both the courts and the Legislature and there is going to be some kind of solution in the future.

Alderman O'Neil stated Alderman Guinta talked about partnering and I think Alderman Porter summed up my comments very, very well. Our partnering is with them being major employers and major property taxpayers in this City...that's something that other communities don't have with any of those companies. We're very fortunate that the utilities are all headquartered here and they have significant operations, so I think we do achieve that partnering and see other monies.

Mayor Baines stated I agree with that statement and they tend to be contributors in a lot of other ways in the community and do a lot of other things because they do have their corporate entities here. Thank you very much, Gentlemen, and now I am going to move to the public hearing portion of our meeting.

Mayor Baines called for those wishing to speak in favor. There were none.

Mayor Baines called for those wishing to speak in opposition. There were none.

Alderman O'Neil moved to deny the Board of Assessor's petition to amend pole license agreements. Alderman Porter duly seconded the motion.

Mayor Baines stated since everyone agreed with Alderman Porter tonight that he can now be the spokesman for the Board going forward too.

Mayor Baines called for a vote on the motion. There being none opposed, the motion carried.

Clerk Thibault stated the City Clerk's office received two communications that were handed out this evening that I will like to summarize for the record. There is a letter from Scott Harris of McLane, Graf, Raulerson & Middleton stating that if the Board decides to grant the petition it is important that any tax the city imposes against Verizon be imposed equally against all others who occupy the rights-of-way and that any effort to single Verizon out for unequal taxation will be met with a lawsuit. He also notes that Verizon does not ascribe any value on its books to its occupation of the public ways, that several well-known nationally recognized appraisers are of the opinion that Verizon's occupation has a negligible taxable value and that the City can expect lengthy litigation concerning the value of Verizon's occupation. The second letter is from Christopher Allwarden, Senior Counsel for PSNH stating that PSNH does not intend to raise a legal objection to the petition, however, that is not to be construed as a waiver in any respect to PSNH's rights to protest, dispute, seek an abatement of, or otherwise legally challenge the purported assessment by the City of Manchester of any incremental property tax upon PSNH's use or occupancy of the public right-of-ways in Manchester and that PSNH fully reserves all such rights.

Mayor Baines stated the actual motion would be to receive and file the petition.

Alderman O'Neil moved that the petition to amend the pole license agreements be received and filed. Alderman Shea duly seconded the motion. There being none opposed, the motion carried.

Mayor Baines advised that all wishing to speak having been heard, on motion of Alderman O'Neil, duly seconded by Alderman Porter, it was voted to take all comments under advisement and further to receive and file any written documentation presented.

This being a special meeting of the Board no further business was presented and on motion of Alderman Smith, duly seconded by Alderman Shea, it was voted to adjourn.

A True Record. Attest.

City Clerk